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**FEDERAL ELECTION COMMISSION**  
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**CELA**

**FIRST GENERAL COUNSEL'S REPORT**

MUR 6429

DATE COMPLAINT FILED: November 1, 2010

DATE ACTIVATED: November 30, 2010

EXPIRATION OF SOL: 10/23/15 – 11/02/15

**COMPLAINANT:**

Joel P. Williams

**RESPONDENTS:**

Unknown Respondents

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 441d

11 C.F.R. § 110.11

11 C.F.R. § 109.21

**INTERNAL REPORTS CHECKED:**

Disclosure reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

According to the complaint in this matter, during the week prior to the November 2010 general election, an "Unknown Political Committee" disseminated several types of mailers in Alabama's 2<sup>nd</sup> Congressional District criticizing Martha Roby, the Republican nominee.<sup>1</sup> The complaint alleges that the mailers failed to include any disclaimers or otherwise identify who paid for the mailers. The mailers attached to the complaint each contained the same bulk mail permit, suggesting that the same person or entity may have been responsible for distributing them. The complaint also alleges that automated calls expressly advocating Roby's defeat lacked a proper disclaimer. Based on the available information, we recommend that the Commission find reason to believe that Unknown Respondents violated 2 U.S.C. § 441d. We also recommend that the

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<sup>1</sup> Roby won the election with 51.1% of the vote, while incumbent Bobby Bright received 48.9%.

Commission authorize a limited investigation to identify who paid for the mailers, and, only if it was a political committee, the cost of the mailers, after which time we would make appropriate recommendations to the Commission.

## II. FACTUAL BACKGROUND

Three mailers were attached to the complaint. The first mailer states, on the front side, "Alabama has been hit especially hard by illegal immigration . . . So, why isn't Martha Roby fighting back?" The back side states "Martha Roby: What Part of Illegal Immigration Doesn't She Understand?" (emphasis in original). Underneath that statement is a paragraph in smaller type:

Martha Roby believes we should only deport those illegal immigrants who have committed a crime. She doesn't think illegal immigrants should be deported until after they are convicted criminals and receive final deportation orders. Isn't it a crime to cross the border illegally? Taxpayers shouldn't have to pay for their stay, Martha.

The mailer concludes with the following statements: "Call Martha Roby: (334) 239-8660. Tell her to get tough on Illegal Immigration." The mailer contains a footnote that references the Roby campaign's website. The phone number listed in the mailer is the number for the campaign.

The front page of the second mailer states "What is Martha Roby spending our taxpayer money on?" The second page of the mailer states:

Martha Roby has criticized "Slush Fund" spending, but as a Montgomery City Council Member, she spent \$660,000 of taxpayer money over three years – on whatever she wanted! Does that sound like the right way to reduce wasteful spending? Call Martha Roby: (334) 239-8660. Tell her to say NO to wasteful slush fund spending.

11044292493

1 The mailer contains a footnote citing the May 7, 2006 issue of the MONTGOMERY  
2 ADVERTISER; a news article in that issue discusses discretionary spending by Montgomery City  
3 Council members. *See id.*, Sebastian Kitchen, "Leaders Split on Spending."

4 The third mailer states, on the front page, "Shouldn't all illegal immigrants be deported?"  
5 (emphasis in original). The back side states:

6 Not according to Martha Roby. Martha Roby says only illegal immigrants with  
7 criminal convictions should be deported [emphasis in original]. Martha Roby  
8 thinks we should only deport illegal immigrants if they are convicted of a crime  
9 and have final deportation orders. Great idea, Martha: wait until they commit a  
10 crime. Then we can pay for: the lawyer, the trial, the appeal, the stay in jail, the  
11 immigration hearing, the appeal of the deportation order, and the trip home. Being  
12 in this country illegally is a crime, Martha. That should be enough. Call Martha  
13 Roby: (334) 239-8660. Tell her to get tough on Illegal Immigration.

14 The three mailers were sent via bulk mail with no return address. They each contained the  
15 same postage mark: "PRSRT STD U.S. POSTAGE PAID WC MLG 10314." The complaint  
16 states that there is "no way to determine" whether the "Unknown Political Committee" has  
17 properly reported the expenditure for the mailers or whether it "coordinated with" the campaign of  
18 Bobby Bright, Roby's opponent in the general election.<sup>2</sup> Complaint at 2.

19 The complaint also alleges that "several automated calls expressly advocating against  
20 Martha Roby were sent to voters in the district lacking the proper disclaimer." Complaint at 1.  
21 The complaint contains no other information about the calls (e.g., no information as to content or  
22 the number or source of the calls).  
23

### 24 III. LEGAL ANALYSIS

25 The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that  
26 whenever a candidate or authorized political committee makes a disbursement for the purpose of

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<sup>2</sup> The statements in the complaint do not appear to directly implicate the Bright campaign; accordingly, we have not sent it a notification letter at this time.

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11044292495

1 financing any communication through any mailing or other type of general public political  
2 advertising, the communication must clearly state that the communication has been paid for by  
3 such political committee. 2 U.S.C. § 441d(a).<sup>3</sup> The Commission's regulations further specify that  
4 political committees must include disclaimers on "all public communications."<sup>4</sup> See 11 C.F.R.  
5 § 110.11(a). Such a communication would include a "mass mailing, or telephone bank to the  
6 general public, or any other form of general public political advertising." 11 C.F.R. § 100.26. A  
7 "mass mailing" means a mailing of more than 500 pieces of mail matter of an identical or  
8 substantially similar nature within any 30-day period. 2 U.S.C. § 431(23). A "telephone bank" is  
9 defined as more than 500 telephone calls of an identical or substantially similar nature within any  
10 30-day period. 2 U.S.C. § 431(24). With regard to both mass mailings and telephone banks,  
11 "substantially similar" means communications that include substantially the same template or  
12 language, but vary in non-material respects such as communications customized by the recipient's  
13 name, occupation, or geographic location. 11 C.F.R. §§ 100.27 and 100.28.

14 At this time, we have no information as to the quantity or cost of any of the mailers.  
15 However, the fact that the mailers all contain the same bulk mail permit, use somewhat similar  
16 language (e.g., "Call Martha Roby: (334) 239-8660. Tell her to . . .") and appear to be roughly  
17 the same size and format (e.g., same typefaces, same type of paper), it is reasonable to infer they  
18 were paid for by the same person or entity. Also, since the permit indicates that the mailers were

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<sup>3</sup> It does not appear that any of the three mailers attached to the complaint satisfy the Commission's regulatory definition of express advocacy at 11 C.F.R. § 100.22. The mailers contain no exhortation to vote and are devoid of electoral references. Therefore, no disclaimer was required in the mailers if an entity other than a political committee paid for them. See 2 U.S.C. § 441d(a). At this time, we do not know the content of the automated calls.

<sup>4</sup> The Explanation and Justification published with the disclaimer regulations states that "each form of communication specifically listed in the definition of 'public communication' must be a form of 'general public political advertising.'" 67 Fed. Reg. 76962, 76963 (December 11, 2002).

1 sent by Standard Mail, it appears that a minimum of 200 pieces of each type of mailer was sent,  
2 given that the postal service requires at least 200 pieces in order to qualify for the Standard Mail  
3 bulk mail discount. See <http://pe.usps.com/businessmail101/getstarted/bulkmail.htm>. Given the  
4 size of the district, it is likely that more than 500 pieces of each type were mailed.<sup>5</sup>

5 Based on previous disclaimer cases involving unknown respondents, it appears that one  
6 factor the Commission considers when determining whether to make reason to believe findings is  
7 the likelihood that an investigation would establish the identity of the respondents. In MUR 5493  
8 (Friends of Jeff Smith), which involved a postcard that criticized a federal candidate but did not  
9 contain express advocacy, the Commission found reason to believe that an "unknown" political  
10 committee violated 2 U.S.C. § 441d. In that matter, the existence of the bulk mail permit number  
11 on the postcard provided a basis to initiate an investigation that ultimately confirmed the identity  
12 of the permit holder and the entity that paid for the postcard. In other cases, where we have had no  
13 information on which to initiate an investigation, the Commission has dismissed the matter rather  
14 than open an investigation with little likelihood of success. See, e.g., MUR 6135 (Unknown  
15 Respondents), MUR 5455 (Unknown in South Dakota). In the present case, based on the lead

<sup>5</sup> Another reason suggesting that the mailing may have been conducted on a broad scale is that the person or entity responsible for it may also have been operating in other areas. An almost identical bulk mail permit number (101314 as opposed to 10314) was referenced in the ADIRONDACK (New York) DAILY ENTERPRISE concerning mailers that criticized Republican congressional candidates in two races in upstate New York just before the 2010 general election:

The mailers don't identify the group sending them out, but it may be the same group as the one that sent a mailer attacking Chris Gibson, Republican candidate in the 20th District, to addresses across New York's 23rd District. Both have a highlighted message on the bottom with the candidate's office number, urging recipients to call and tell Doheny or Gibson the topic of the mailer. Both also have the same mass mail label and permit identification: "WC MLG 101314."

We are not aware at this time of any connection between the New York mailers and the mailers at issue except for the almost identical bulk mail permit number, and the subject matter of the mailers is different. However, if we uncover any evidence during our proposed investigation that suggests the same person or entity paid for them, we will make appropriate recommendations.

11044292496

provided by the bulk mail permit number, we believe there is a high probability that we will be able to identify the person or entity that paid for the mailers at issue.

Based on the above, this Office recommends that the Commission find reason to believe that Unknown Respondents violated 2 U.S.C. § 441d.

**IV. PROPOSED DISCOVERY**

We propose a limited investigation intended to first identify the entity responsible for the mailers.

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Accordingly, we recommend that the Commission authorize the use of compulsory process to investigate this matter.

**V. RECOMMENDATIONS**

1. Find reason to believe that Unknown Respondents violated 2 U.S.C. § 441d.
2. Authorize the use of compulsory process in this matter.

Christopher Hughey  
Acting General Counsel

February 18, 2011  
Date

Susan L. Lebeaux  
Susan L. Lebeaux  
Acting Deputy Associate General Counsel  
for Enforcement

Peter G. Blumberg  
Peter G. Blumberg  
Assistant General Counsel

Thomas J. Andersen  
Thomas J. Andersen  
Attorney

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